

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID GORDON REAM,

Defendant-Appellant.

UNPUBLISHED

July 31, 2007

No. 268266

Oakland Circuit Court

LC No. 2004-199313-FC

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, and first-degree criminal sexual conduct, MCL 750.520b(1). The case was tried before a jury, which returned a guilty verdict on these counts and found defendant not guilty for first-degree premeditated murder. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to life imprisonment without parole for the first-degree murder conviction, life imprisonment for the second-degree murder conviction, and 40 to 60 years' imprisonment for the CSC I conviction. We set aside defendant's duplicative conviction for second-degree murder and the underlying felony conviction for CSC I, but we affirm in all other respects.

This case arose after defendant forced his elderly neighbor into her bedroom, stripped her of her clothing, and stabbed her twenty-three times with a kitchen knife. The next day, the victim's daughter discovered the victim's dead body lying sideways in bed wearing only socks and one slipper. The knife was still protruding from the victim's abdomen. The daughter went to defendant's apartment to call the police, and defendant left his apartment in the middle of the phone call and went to his mother's house. Police discovered that the woman's assailant stabbed her four times in her genital area at a shallow angle, and one of those knife thrusts pierced the upper, but interior, portion of the victim's right labium majus. Pubic hairs were found on the bed near the dead body, on the bedroom carpet, and on clothing left lying on the floor of the victim's bedroom. Scientific analysis, including DNA testing, confirmed that the pubic hairs matched samples that were later removed from defendant. Although defendant had known the victim for years, he did not attend her funeral and moved out of his apartment the next day. He was eventually arrested at his brother's house in another state.

Defendant first argues that the trial court erred by allowing the prosecution to amend the information to include felony murder and first-degree criminal sexual conduct (CSC I), and by

denying defendant's motion for a directed verdict on those charges. Specifically, defendant argues that the crime could not constitute CSC I as a matter of law, because the assailant did not penetrate the victim's genital opening as required by MCL 750.520a and MCL 750.520b. We disagree. The photographic evidence in this case clearly demonstrates that the victim suffered a knife jab to the inside of her right labium majus, and that the thrust did not originate from the outside of the labium majus. In other words, the knife's blade had to penetrate between the victim's labia majora to make the intrusion indicated in the photograph. As we have previously held, the Legislature's use of the words "intrusion, however slight," and "genital . . . openings" in MCL 750.520a to define "sexual penetration" indicate its intent to include penetration between the labia majora in its definition of sexual penetration. *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981). We see no reason to deviate from that interpretation in the egregious and heinous circumstances of this case.

Nor are we persuaded by defendant's argument that we should distinguish *Bristol* because the wounds in this case did not reflect sexual advancement toward the vagina. Not only does this argument misstate the statutory standard, it does not correspond to the facts of the case. The four knife wounds to the victim's vulva and its immediate vicinity clearly demonstrate defendant's fixation on the victim's genitalia. Also, the victim's state of undress, defendant's pubic hairs, and the angle of defendant's knife thrusts all overwhelmingly suggest a disturbingly sexual element to defendant's crime. It would not do any justice to our earlier interpretation of the statute to hold that a defendant must actually insert a knife blade into the vagina proper before we will find that sexual penetration has occurred. Therefore, we reject defendant's argument that the crime could not constitute CSC I as a matter of law. It follows that the trial court correctly denied defendant's motion for directed verdict on the CSC I charge and that we will not disrupt the trial court's post-bindover, un-appealed decision to grant the prosecutor's motion to reinstate the CSC I and felony murder charges to the information. See *People v Hall*, 435 Mich 599, 601-603, 615; 460 NW2d 520 (1990); *People v McGee*, 258 Mich App 683, 693-694; 672 NW2d 191 (2003). We also reject defendant's corollary challenge to the trial court's CSC I jury instructions.

Defendant also cursorily raises an insufficiency of the evidence challenge to his second-degree murder and felony-murder convictions. However, the wounds, weapon, and state of the victim's body provide sufficient evidence, beyond a reasonable doubt, that the charged crimes were committed; and the pubic hair evidence found on the victim's carpet, on her stripped clothing, and near her dead body on the bed, all establish, beyond a reasonable doubt, defendant's identification as the culprit. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Therefore, the prosecutor presented sufficient evidence to sustain defendant's convictions.

Defendant also argues that the trial court erred by allowing the jury to view autopsy photographs of the victim's body. "The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Contrary to defendant's argument, the photographs were certainly pertinent to defendant's state of mind and absolutely relevant to the essential elements of the charged crimes, such as his malice and his sexual penetration of the victim's genital openings. MRE 402; see also *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972). Moreover, the photographs' color accentuated and clarified the location of

the victim's wounds, and the projection of the photographs onto a screen allowed the expert witness to refer to them while they were being published to the jury as individual photographs. Therefore, the prosecutor's enhancements did not render the photographs unduly prejudicial, and the trial court did not abuse its discretion by allowing the prosecution to present the photographic evidence as it did.

Defendant next argues that the prosecutor committed misconduct by referring to defendant's attack on the victim's "vagina," when, anatomically speaking, defendant only stabbed the victim's vulva and the surrounding genital area. We disagree. Defense counsel failed to object to the technical misidentification of the particular anatomical region stabbed, so "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). In this case, the prosecutor clearly used the term "vagina" in the colloquial sense, and obviated any prejudice caused by the technical mischaracterization of the evidence by referring the jury directly to the photographs depicting the victim's wounds. Under the circumstances, a timely instruction would have quickly and completely assuaged any prejudice caused by the prosecutor's lack of meticulousness in referring to the victim's anatomy. Therefore, we reject defendant's challenge on these grounds.

Defendant next argues that the trial court erred by admitting the 911 recording of the call placed by the victim's daughter from defendant's apartment on the day after the murder. We disagree. Defense counsel stipulated to the admission of the recording, and defendant fails to demonstrate anything that would render the recording plainly inadmissible, especially in light of MRE 803, *People v Walker*, 273 Mich App 56, 60; 728 NW2d 902 (2006), and *Davis v Washington*, ___ US ___, 126 S Ct 2266; 165 L Ed 2d 224 (2006). Therefore, we reject this undeveloped claim of error and find no ineffective assistance of counsel stemming from trial counsel's stipulation to the admissibility of this evidence. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant also raises several challenges to the admission of a videotaped police interview with defendant's cellmate, Dean Rector. Defendant first argues that the interview with Rector constituted hearsay, so it was plainly inadmissible evidence notwithstanding trial counsel's failure to object. We disagree. Defendant fails to contravene the prosecutor's proposed purpose for introducing the evidence, namely impeachment. Rector had testified during cross-examination that police offered him a five-year cap on his murder and manslaughter sentences if he testified against defendant. The videotape of the interview did not collaborate Rector's testimony, so it was admissible to impeach Rector's recollection of the events. The videotape was not introduced to prove the matters asserted, (i.e. that the officers would talk to Rector's prosecutor if he provided them with information about defendant's case, or that Rector did not have any information about defendant's crime) so the statements in the interview do not meet the definition of hearsay under MRE 801(c). Instead, the videotape was relevant impeachment evidence that undermined Rector's credibility and countered the defense's insinuation that police were desperately trying to dredge something up on defendant, or that Rector would have had information and would have provided it if defendant had actually committed the crimes. In the end, defendant fails to demonstrate any error in admitting the videotape into evidence and has not demonstrated any misuse of the tape once its contents were

published to the jury. MRE 402 and 607; *People v Sabin, (On Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Therefore, we find no plain error regarding the videotape. MRE 103.

In related arguments, defendant challenges the trial court's handling of a series of questions asked by the jurors during deliberations and claims that his trial counsel provided ineffective assistance by completely mismanaging Rector's testimony and the videotape impeaching it. As an initial matter, we note that the jurors did not request to review any evidence other than the videotape. The tape had been admitted into evidence, so the jury's request to review the tape was reasonable, and the trial court's compliance with the request comported with MCR 6.414(J). The other requests asked for direct, factual answers to highly charged questions, such as whether defendant's hair samples matched the hair found at the victim's apartment and why investigators did not find any fingerprints in the apartment. By requiring the jury to rely on its collective memory, the trial court wisely handled the issue and avoided usurping the jury's role as factfinder. Because the jury did not request a review of any particular officer's testimony, and because the trial court did not permanently foreclose any review of any specific testimony, the trial court did not plainly violate MCR 6.414(J), and defense counsel did not provide ineffective assistance by agreeing to the trial court's response to the jurors.

Nor did trial counsel provide ineffective assistance by deciding to call Rector, stipulating to the admission of the videotape into evidence, or allowing the jurors to view the tape during deliberations. Because defendant did not raise the issue of ineffective assistance in the trial court or seek a *Ginther*¹ hearing, we limit our review of defendant's claims to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. [*Id.* at 140, citations omitted.]

Rector's testimony stood in stark contrast with the other defense witnesses because Rector had no readily apparent bias in defendant's favor. In fact, trial counsel did a fine job emphasizing that Rector had every incentive to concoct a story about defendant confessing, but Rector did not. Therefore, Rector's lack of information about the crime injected a dose of doubt, however small, into an otherwise straightforward case. Although Rector overstated the incentive offered by police, several aspects of his testimony corresponded with the videotaped police interview, and the tape of the interview could be interpreted as satisfactorily explaining the "inconsistent" portions of Rector's testimony. In other words, defendant's appeal overstates the potential prejudice of the videotape and underestimates the value of Rector's testimony. Clearly, defendant's trial counsel thought that the reward of presenting the testimony outweighed the risk

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

of any prejudice it might generate. This is the definition of sound trial strategy, and we will not revisit the decision with the benefit of hindsight. *Id.* Once Rector testified inconsistently with the videotape, the tape was admissible to impeach him, and defense counsel did not commit misconduct by failing to raise meritless objections. *Thomas, supra.*

Defendant's final issue has merit. Defendant correctly claims that the trial court violated double jeopardy principles by entering convictions and sentences against defendant for felony-murder, second-degree murder, and the underlying felony of CSC I. See *People v Clark*, 243 Mich App 424, 429-430; 622 NW2d 344 (2000); *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998).² Therefore, we set aside defendant's convictions and sentences for second-degree murder and CSC I. We affirm defendant's conviction for felony murder and his corresponding sentence of life without the possibility of parole.

Defendant's convictions and sentences for second-degree murder and CSC I are vacated because they violate defendant's double jeopardy rights. In all other respects, defendant's first-degree felony murder conviction and its sentence are affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell

I concur in result only.

/s/ E. Thomas Fitzgerald

² We note our disagreement with the continuing appellate practice of vacating valid convictions on the basis of multiple-punishment double jeopardy principles when the additional convictions and sentences do not add any time to a defendant's prison term. See *People v Williams*, 265 Mich App 68; 692 NW2d 722 (2005) (J. O'Connell, dissenting). We note that the panel in *Bigelow* did not treat the dismissal of valid convictions lightly, which was why it implemented an "alternative theories" approach to a defendant's convictions for multiple types of murder. The practice of vacating sentences serves no identifiable legislative purpose and merely increases the risk that the case will fall into a procedural quagmire, resulting in a convict's premature release and utterly subverting the paramount goal of justice: a goal shared by our high courts and our Legislature.